In the Supreme Court of the United States

October Term, 1968
No. 51

UNITED STATES OF AMERICA,
Appellant

vs.

JOSEPH FRANCIS NARDELLO and
ISADORE WEISBERG,
Appellees

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEES

F. EMMETT FITZPATRICK, JR.,
Room 1505, 12 S. 12th St.,
Philadelphia, Pa. 19107,
CHARLES A. PERUTO,
202 N. Broad Street,
Philadelphia, Pa. 19102,
Attorneys for Appellees.

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.
Joseph F. Heffernan, Philadelphia Representative, MU 6-5692

INDEX TO BRIEF

TABLE OF CITATIONS

COUNTER-STATEMENT OF THE CASE

The defendants, Isadore Weisberg and Joseph Nardello are indicted on two bills of indictment and charged with violations of 18 U.S.C., Section 1952, Section 371, Section 2. The two bills of indictment differ only in that bill 22709 charges a fourth defendant, William Joseph Burke with this crime and alleges a date approximately a year earlier than bill of indictment 22718. The defendants Weisberg and Nardello are similarly charged in both bills.

Count one of both bills charges the defendant Kaminsky and in one instance the defendant Burke with unlawfully traveling in interstate commerce from Chicago, Illinois to Philadelphia in the Eastern District of Pennsylvania with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, the crime of Blackmail by Injuring Reputation and Business in violation of Sec. 4802 of the Pennsylvania Penal Code and Blackmail by Accusation of Heinous Crime in violation of Sec. 4803 of the Pennsylvania Penal Code. This count further alleges that defendants Kaminsky and Burke did subsequently perform acts in pursuance of this intention to commit unlawful activity.

Count two of both bills charges the defendant Weisberg, the defendant Nardello, the defendant Kaminsky, and in one instance the defendant Burke with unlawfully conspiring to commit a violation of Sec. 1952 of Title 18

of the United States Code. The allegations are there made that the defendants Nardello and Weisberg met with and supplied information for the "unlawful activity" of the defendants Kaminsky and Burke.

The facts charged in the indictment further allege that the defendant Kaminsky, in both bills, and the defendant Burke, in one bill, subsequently visited a victim and related to the victim that they, Kaminsky and Burke, were members of the Philadelphia Police Department and that the victim was subject to an immediate arrest unless he paid them a sum of money. Bill 22709 further charges that Kaminsky and Burke obtained $5000.00 from the victim as a result of these untrue allegations.

These defendants are indicted pursuant to Sec. 1952 of Title 18 of the United States Code. This section makes it a federal crime to travel in interstate commerce to "promote, manage, establish, carry on, or facilitate, etc., any unlawful activity." Other charges in the bills of indictment which tend to establish the guilt of the defendants, Nardello and Weisberg, by reason of any conspiracy theory depend for their validity upon the acts committed in violation of Sec. 1952.

On motion of the appellees, the district court dismissed the indictments. The court ruled that the conduct charged in the indictment could not constitute extortion under the Pennsylvania Penal Code, and therefore the indictments failed to charge the appellees with a crime within the meaning of Title 18 U.S.C. 1952.

ARGUMENT

I.

The Indictment Does Not Charge a Crime Under Title 18 U.S.C., Sec. 1952

Only travel in interstate or foreign commerce which is directed toward "unlawful activity" is illegal under Sec. 1952. "Unlawful activity" is specifically defined under that section by referring to certain enumerated offenses. Blackmail is not one of these offenses. Moreover, Blackmail by Accusation of Heinous Crime and Blackmail by Injuring the Reputation and Business are not among these enumerated offenses.

The activity of the defendant as described in the bill of indictment could arguably result in their convictions for Blackmail by Accusation of Heinous Crime in Pennsylvania. It could not, however, result in their conviction for any of the crimes defined as "unlawful activity" under Sec. 1952 of Title 18. Moreover, since there is a specific statute defining as a crime the activity charged in this case (18 P.S. 4803, Blackmail by Accusation of Heinous Crime) they could not properly be convicted in Pennsylvania of either Blackmail or Blackmail by Injury to Reputation or Business. *Commonwealth v. Litman*, 187 Pa. Superior Ct. 531 (1958). Thus it is unlikely that the defendants in the instant action could have been convicted of the crime of blackmail in violation of the laws of Pennsylvania. For this reason the indictment is defective. The defect is not such that it could be remedied by subsequent legal proceedings.

II.

Blackmail Cannot Be Equated With Extortion Under the Law of Pennsylvania

The indictment attempts to equate the conduct of the defendants charged therein with the crime of extortion. Extortion is one of the enumerated "unlawful activities" within Sec. 1952. If any of the defendants so charged in the indictment had committed extortion after traveling in interstate commerce as charged in the indictment, there is little doubt that they could be convicted under Sec. 1952.

Extortion is specifically defined by statute in Pennsylvania.

> "Whoever, being a public officer, wilfully and fraudulently receives or takes any reward or fee to execute and do his duty and office, except such as is or shall be allowed by some act of Assembly, or receives or takes, by color of his office, any fee or reward whatever, not, or more than is, allowed by law, is guilty of extortion, a misdemeanor, and on conviction, shall be sentenced to pay a fine not exceeding five hundred dollars ($500), or to undergo imprisonment not exceeding one (1) year, or both."
>
> 1939, June 24, P.L. 872, §318, 18 P.S. §4318.

Cases are legion in Pennsylvania deciding whether or not various public officials are "public officers" under the statute. However, nowhere has it been successfully contended that one who is not a "public officer" could be

guilty of extortion. To do so would be a ridiculous abuse of the statute.

The defendants in this bill of indictment are not and never were "public officers" either in Pennsylvania or anywhere else. On the contrary, they are accused of impersonating police officers of the City of Philadelphia. The United States Government therefore not only concedes but contends and will prove at trial that these people are not "public officers" of Pennsylvania.

Sec. 1952 specifically refers to state law as defining the offenses used in the "unlawful activity." Under the law of Pennsylvania, the defendants could never have been convicted of extortion.

III.

Congress Never Intended To Equate Extortion With Blackmail in Those States, Like Pennsylvania, Which Legally Distinguish the Two Offenses

---

The Government urges upon this Court that it equate the crimes of blackmail and extortion under the laws of Pennsylvania for purposes of Sec. 1952. They contend that this is the true meaning of Congress. While they admit that Congress did not undertake in the statute to define "extortion" they urge that Congress really intended that the term "extortion" operate in its generic sense according to modern usage.

The Government concedes that the common law concept of the term "extortion" designated the crime committed by a public officer. After a review of the problems which faced Congress at the time the Act in question was passed and a notation of the philosophical aims of the proponents of the Act they conclude that these purposes would best be served if "extortion" were given the widest possible meaning.

Of course, from the Government's point of view, it would have been far more fitting had Congress undertaken to outlaw all criminal activity connected with interstate commerce. A simple reading of Sec. 1952 shows that this was obviously not the intention of the Congress. There are many serious crimes which were not defined as "unlawful activity." Then too, as the Government so

aptly points out in its Appendix B there existed at that time a vast lack of uniformity among the states regarding the definition of the term "extortion." We cannot assume that Congress was ignorant of this lack of uniformity. On the contrary, it is eminently clear that Congress fully intended this lack of uniformity to continue when it added the phrase "in violation of the laws of the state in which committed" to Sec. 1952. This phrase has an even deeper meaning in Sec. 1952. Arguably it would exempt from this section those individuals whose activity may be proscribed by state laws but who, for one reason or another, were not found "in violation" of the laws of those states. But whatever intention was in the mind of Congress when this statute was finally brought forth as a full-fledged law, it is too clearly drawn to permit the inference that Congress was describing a form generic activity. This they could readily have done by defining "extortion." Not only did they fail to so define this term but they specifically established the defining standard as that being in existence throughout the various states at any time in the future when prosecution was contemplated under Sec. 1952.

The United States Government does not have primary jurisdiction over internal crimes committed within a state. Its jurisdiction, in the present statute, depends upon travel in interstate commerce. However, its definition of "unlawful activity" was logical in not mentioning the crime of blackmail as defined by the law of Pennsylvania.

Blackmail is a crime which takes place between two private citizens. This certainly is a problem of local concern. Extortion, on the other hand, and bribery, which is also mentioned under Sec. 1952, both demand the partici-

pation, in one way or another, of public officials. By the inclusion of these two crimes and the exclusion of blackmail, the Government showed its concern for decent and efficient operations in local government. Assuming that there is such law enforcement machinery present within a state, the government has quite clearly indicated its intention not to interfere by excluding blackmail, and numerous other serious crimes which do not affect the moral fiber of local government.

The difference between blackmail on one hand and bribery and extortion on the other hand, is so natural that the court can not assume that the government meant to include blackmail activity under the definition of extortion and bribery. Such a definition does not limit the purpose of this "Travel Act." Criminal activity which the Government seeks to include within this Act is always punishable by the states themselves. As a matter of fact nothing in this Act seeks to enlarge the ability of either the state or the federal government to punish criminal actions. So long as efficient law enforcement machinery exists within a state, a defendant may always be punished under state law. Such is clearly evident in the instant case. Where, however, this law enforcement machinery is not able or willing to efficiently prosecute, the federal government seeks to enter the prosecution field through the vehicle of the "Travel Act." Its distinction between crimes which affect the efficiency of local law enforcement and those which do not is not only proper but highly logical.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be sustained and the indictments against the appellees ordered quashed.

Respectfully submitted,

F. EMMETT FITZPATRICK, JR.,

A. CHARLES PERUTO,

Attorneys for Appellees.